No. 95-5661

In The

# Supreme Court of the United States

October Term, 1995

JUAN MELENDEZ,

*Petitioner,*

vs.

UNITED STATES,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITIONER'S REPLY BRIEF

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## ARGUMENT IN REPLY

The respondent stakes its entire position in this case on a strained interpretation of the first clause of 18 U.S.C. § 3553(e), read in isolation. The respondent infers that this clause alone necessarily mandates a bifurcated, two-track substantial assistance system, which requires separate and exclusive government motions for a sentence below a statutory minimum and a sentence below a guideline range.

The respondent's analysis of § 3553(e) is wrong both as a matter of general statutory interpretation and based upon clear evidence of a contrary congressional intent. Instead, § 3553(e) must be construed in conjunction with the two related provisions which were enacted contemporaneously with § 3553(e) as part of the Anti-Drug Abuse Act of 1986 ("ADAA"), now codified at 28 U.S.C. § 994(n) and Fed. R. Crim. P. 35(b).

In addition, petitioner's interpretation of USSG § 5K1.1 (p.s.), unlike the respondent's, is consistent with the Commission's intent and the Congressional mandate for a unified substantial assistance regime. For these reasons, a motion by the government under § 5K1.1 for a sentence that reflects a defendant's substantial assistance to authorities allows the court, in its discretion, to impose a sentence which either departs below the guideline range, or is lower than a statutory minimum, or both.

### I. Congress Empowered the Commission to Authorize Courts to Sentence Below a Statutory Minimum Once the Prosecutor Moves For a Sentence that Reflects the Defendant's Substantial Assistance.

The ADAA created an incentive for defendants to aid law enforcement efforts by authorizing reduced punishment for those who provide "substantial assistance" in the investigation or prosecution another person. This is reflected in three consecutive provisions of the ADAA –

Section 1007 (enacting 18 U.S.C. § 3553(e)), Section 1008 (enacting 28 U.S.C. § 994(n), and Section 1009 (amending Rule 35(b) of the Federal Rules of Criminal Procedure). Interpretation of any one of these three contemporaneously enacted provisions cannot ignore the meaning and language of the other two. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 405 (1991) (recognizing relationship of ADAA §§ 1007 and 1009). As the Court recently stated in *Reno v. Koray*, 515 U.S. ___, 132 L.Ed.2d 46, 115 S.Ct. 2021, 2025 (1995), "it is a fundamental principle of statutory construction (and, indeed, of language itself), that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it was used." *Id.*, citing *Deal v. United States*, 508 U.S. ___, 113 S.Ct. 1193, 1996, 124 L.Ed.2d 44 (1993).

### A. The Government's Exclusive Reliance on the First Clause of § 3553(e) Violates Basic Tenets of Statutory Construction.

The respondent asserts that the prosecutor must invoke 18 U.S.C. § 3553(e) expressly in its substantial assistance motion, otherwise the court is powerless to impose a sentence below a statutory minimum. The government arrives at this construction of the statute by a myopic focus on the first clause of the first sentence of § 3553(e), which states, "Upon motion of the government, . . . . " Resp. Brief 11-12.

The first clause of § 3553(e) does not necessarily, by its terms, establish the entire procedural framework for its implementation. The government's claim that its motion must cite § 3553(e) to trigger the court's authority can only be premised on the false assumption that § 3553(e) is the sole statute concerning sentences lower than statutory minimums in recognition of substantial assistance. Therefore, so the logic goes, § 3553(e), by



default, must also fully describe the implementing mechanism.[1]

*Koray* presented a similar statutory interpretation issue. In that case, while the Court recognized that viewed in isolation either party's interpretation of the term "official detention" might be valid, the correct definition could only be determined by examining the other provisions of the Bail Reform Act and the Sentencing Reform Act, using that and related phrases, with which the provision at issue had been enacted. *Id.* Similarly, § 3553(e) cannot be interpreted as an isolated text. Only an examination of § 3553(e) in the context of three interrelated substantial assistance provisions of the ADAA including § 994(n) and the amended Rule 35(b), yields a proper interpretation of § 3553(e).

Several points emerge from such an examination. First, each of these provisions uses the same definition of "substantial assistance" and explicitly was intended to reach statutory minimum cases. Second, the ADAA's amendment to Rule 35(b) provides a single mechanism for both statutory minimum and guideline range post-conviction sentence reductions. Third, Congress empowered the Commission in § 994(n) to create a single mechanism to implement a court's statutory sentencing authority, including its authority under § 3553(e). It follows that Congress intended to create a unified approach for substantial assistance sentences in which § 3553(e)'s authority may be implemented through the Commission's guidelines and policy statements.

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[1] In its opposition to the petition for certiorari, the respondent took the contrary view, claiming that the language of § 3553(e) was ambiguous. Brief in Opp. at 6-7 n. 4. The language cannot be as clear as now claimed if the government's own counsel could not readily see its meaning.

### 1. Congress' Directions to the Commission to Regulate Substantial Assistance Cases that Encompass Both Guideline and Statutory Minimums Belies the Government's Claim that Congress Intended to Mandate a Bifurcated, Two-Motion System.

Not only is the government's analysis of the ADAA flawed due to its preoccupation with the first clause of § 3533(e), the government also ignores the clear implications of the language of 28 U.S.C. § 994(n) and the amended Rule 35(b).

In § 994(n), Congress directed the Commission to devise guidelines that impose a lower sentence to account for substantial assistance, "*including* a sentence that is lower than that established by a statute as a minimum sentence." (Emphasis added). Therefore, it is entirely consistent with Congressional intent for the guideline provision which is the Commission's implementation of § 994(n) to serve as the mechanism for triggering the court's authority under § 3553(e), as long as the Commission includes in that provision the government motion requirement of § 3553(e). Section 5K1.1 meets this criterion by requiring a government motion for sentences below both a guideline and statutory minimum. If § 5K1.1 were intended to encompass only guideline departures, a government motion would not have been necessary, because § 994(n) does not mention that precondition.

The government attempts to dismiss the import of § 994(n) by characterizing petitioner's argument as a claim that § 994(n) "trump[s] the requirement in Section 3553(e) of a government motion as a prerequisite to a departure below the statutory minimum." Resp. Br. at 20-21. This argument is a straw man. Petitioner has never argued that a government motion is not required to empower the court to sentence below a statutory minimum on account of substantial assistance. Rather, the critical question the government fails to answer directly



is whether Congress envisioned under § 994(n) that two different motions were required in substantial assistance cases to distinguish between a sentence below a guideline range and a statutory minimum.[2] The express reference to both situations in § 994(n) reflects a Congressional intent that the Commission could devise a single generic mechanism to trigger the court's authority in either case. Thus, § 3553(e) and § 994(n) do not conflict. These two sections merely authorize the two appropriate authorities, the court and the Commission, to implement this single exception to otherwise binding sentencing rules elsewhere imposed each.

### 2. The Contemporaneous Creation of a Single Motion Requirement For Post-Conviction Substantial Assistance Sentence Reductions Shows that Congress Intended That Only One Motion Be Necessary to Trigger a Court's Full Statutory Authority in Substantial Assistance Cases.

Any remaining uncertainty over whether Congress intended there to be separate motion-tracks for sentences below a statutory minimum and a guideline range is resolved by examining the third substantial assistant provision of the ADAA. As correctly noted by the government, Resp. Br. at 3 n.1, Rule 35(b) of the Federal Rules of Criminal Procedure was also amended as part of the ADAA. Section 1009, of that Act provides that upon motion by the government, a court has authority to reduce a previously imposed sentence to reflect a defendant's substantial assistance made after the imposition of

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[2] It should be acknowledged that when we say "two different motions", we recognize that the respondent's theory of its own power would allow a single motion, so long as it contained two citations to authority, referencing explicitly both § 5K1.1 and § 3553(e).

sentence. *See also* 18 U.S.C. § 3582(c)(1)(B). Like § 3553(e), § 1009 required that such sentence be imposed "in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, under United States Code . . . ". However, section 1009 also added the following critical language to Rule 35(b):

> The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.

Thus, the ADAA created one rule, Rule 35(b), under which only one post-sentence motion by the government is necessary to trigger the court's authority to impose a sentence that is a lower than a guideline range and/or lower than a statutory minimum. The implication of this one-motion regime for post-conviction substantial assistance reductions is fatal to the government's claim that the ADAA nevertheless implicitly created a bifurcated, two-motion requirement for substantial assistance motions at sentencing.

Under the respondent's interpretation, a defendant who provides "substantial assistance" before sentencing must bargain for a government promise to move for a sentence lower than a statutory minimum and separately seek a government promises to move for a downward departure from the guidelines. Otherwise, the government insists, the court is powerless to grant one or the other form of relief. On the other hand, under the ADAA-amended Rule 35(b), a defendant who waits until after sentencing to provide substantial assistance need only obtain the promise of a single government motion under Rule 35(b) to empower a court to grant both kinds of relief.

Congress cannot have intended such an absurd result, which would encourage defendants to delay their cooperation until after sentencing. Rather, the proper



inference to be drawn from the amendment to Rule 35(b) is that Congress envisioned that for both pre- and post-sentence substantial assistance, the government has only the power to move the court to recognize the substantial assistance, upon which the court is fully empowered to impose an appropriate sentence, be it lower than the guideline range or lower than a statutory minimum, or both. This reading of the ADAA's three substantial assistance provisions is straightforward and internally consistent; the respondent's interpretation is not. Furthermore, the government's logic is flawed even when applied to its own actions in this case.

### B. The Government Met the Conditions of § 3553(e) in this Case and Thereby Empowered the District Court to Impose a Sentence Lower than the Statutory Minimum.

The respondent argues that it did not make the motion described by § 3553(e) to authorize the court to impose a sentence below a statutory minimum. Examination of the government's actual conduct, in this case, reveals the same mistaken premise that Congress itself created a bifurcated, two-track system.

In the District Court, the government filed a § 5K1.1 motion which sought a lower sentence for petitioner Melendez in recognition of his having provided substantial assistance to law enforcement authorities.[3] The plea agreement provided that the government would move, pursuant to § 5K1.1, for a sentence below the applicable guideline range. That agreement, however, did not state

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[3] The government actually filed an informal letter "in lieu of a formal brief." J.A. at 13-14. The District Court understood, as have the parties, that by this letter, the government had moved on the basis that substantial assistance had occurred. *See* Judgment in a Criminal Case, J.A. 21.

how far below the guideline range the government would seek to have sentence imposed, and it certainly did not specify any floor for such a reduction. J.A. 4-11.[4] Thus, the government in this case did comply with the first requirement of § 3553(e) that the government make a motion for a lower sentence based on its judgment that the defendant had provided substantial assistance. On that basis alone, the court was authorized by § 5K1.1 and § 3553(e) to impose a sentence departing below the applicable guideline range, even if that sentence was also lower than the statutory minimum.

Thus, the government cannot represent that the motion it did file was somehow substantively deficient. Rather, it must fall back on its argument that § 3553(e)'s first clause implicitly requires a citation to § 3553(e) in the motion or a specific request for a sentence below a statutory minimum. As has been shown, however, the government simply cannot justify this position based upon the first clause of § 3553(e) alone. In essence, the government interprets this clause as if it included the additional phrase, upon motion of the government *pursuant to this section*. Without this insert, however, there simply is no requirement that the government's motion do more than allege substantial assistance and request a lower sentence to validly trigger the district court's authority under

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[4] The only reference to a statutory minimum in the plea agreement is a boilerplate reference to the statutory penalties. *Id.* at 6. The agreement does not indicate in any way that the government opposed a sentence lower than a statutory minimum. In fact, the agreement notes that the sentence to be imposed is within the sole discretion of the sentencing judge, "subject to the provisions of the Sentencing Reform Act, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998. *Id.* Thus, this agreement could readily be construed by petitioner (as indeed it was) as still permitting the court, pursuant to § 3553(e), to impose a sentence lower than the statutory minimum.



§ 3553(e). In fact, the government has admitted as much when it noted in its brief in opposition to the petition for certiorari, that a bill to add such language to § 3553(e) was introduced in Congress this year.[5]

The government attempts to avoid this result by charging that under petitioner's approach, a government motion under § 5K1.1 is not a true petition for relief, but simply a government "acknowledgement that the defendant has provided substantial assistance" or "a statement from the government that the defendant has provided substantial assistance." Resp. Br. at 18, 19. These quotations mischaracterize petitioner's argument. All motions require a court to "recongize" or "acknowledge" the predicate facts that underlie a request for relief. *See* Fed. R. Crim. P. 47. A substantial assistance motion must contain a representation that substantial assistance has been rendered. The court must "recognize" or "acknowledge" this assertion before it can grant relief. This has no bearing on whether the court can exercise its authority under § 3553(e) to sentence below a statutory minimum once the government makes this representation as a basis for seeking a lower sentence. Under the unified approach of the ADAA, no more than and no less than a government motion for a sentence that reflects the defendant's substantial assistance and the court's evaluation of that assistance under § 5K1.1 is necessary to trigger the court's full statutory authority, including its authority to sentence

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[5] Brief in Opp. at 7, note 4. *See* Section 735 of S.3, 104th Cong., 1st Sess. (1995), reprinted in 141 Cong. Rec. S90 (daily ed. Jan. 4, 1995) (statute would add the following language to § 3553(e): "the power to reduce a sentence under this section authorizes a court to impose a sentence that is below a level established by statute as a minimum sentence only on motion of the government specifically seeking reduction below such a level.").

below a statutory minimum.[6] The extent of that sentence reduction may be guided by a prosecutorial recommendation, but the government cannot control the outcome by the citations in its pleadings.

## II. The Commission Implemented the Congressional Mandate for a Unified Substantial Assistance System in Policy Statement § 5K1.1.

Section 994(n) of Title 28 U.S. Code, directs that the Sentencing Commission's guidelines account for substantial assistance rendered to law enforcement by defendants, including cases involving statutory minimums. Rather than start with this mandate and presume that the Commission faithfully complied, the respondent begins with its peculiar interpretation of § 3553(e) and then claims "it would be surprising" if the Commission intended to contradict the government's view of the first clause of that statute. Resp. Br. at 22. The respondent's approach to U.S.S.G. § 5K1.1 (p.s.) turns the concept of agency deference on its head. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (agency's action "entitled to a presumption of regularity"). Instead, the proper approach is to begin with the mandate in

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[6] In the absence of supporting evidence of Congressional intent, the government's argument that it can restrict the court's sentencing authority by the form of or citations within its motion boils down to an elevation of form over substance, and thus is reminiscent of the archaic rules of pleading that were abolished with the creation of the modern codes of civil and criminal procedure. *See* Surbin, Stephen, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 U. Pa. L. Rev. 909, 915-16 (1987). *Cf.* 28 U.S.C. § 1653; Fed. R. Crim. P. 7(c)(3). It is contrary to the entire philosophy of federal procedural rules, under which the court's power to act is seldom, if ever, constrained by the movant's citations of authority.



§ 994(n) and the Commission's response in § 5K1.1. If § 994(n) and § 5K1.1 are consistent with one another, but not with the government's proposed interpretation of § 3553(e), it is the government's approach to § 3553(e), and not § 5K1.1, which needs to be revisited.

### A. The Commission Reasonably Concluded that Congress Desired a Single Guideline Mechanism For Substantial Assistance Cases.

As discussed in Part I of this Reply Brief, the three substantial assistance provisions of the 1986 ADAA demonstrate Congress' preference for a unified, one motion substantial assistance regime.

By requiring a government motion in § 5K1.1, the Commission demonstrated its effort to devise a guideline provision that would apply equally to both guideline and statutory minimum cases. There is no apparent reason for the Commission's decision to extend the government motion requirement to guideline cases other than to unify the substantial assistance sentencing for statutory and guideline minimums. The respondent's brief never addresses this point. Furthermore, the government ignores the fact that § 5K1.1 was submitted to Congress for review, which then permitted it to go into effect; *see* U.S.S.G. Ch. 1, Part A(2); 52 Fed. Reg. 18046, 18103-04 (May 13, 1987); further supporting the inference that Congress viewed § 5K1.1 as a proper application of the statutory mandate.

### B. The Text of § 5K1.1 Is Consistent With the View That the Commission Intended this Policy Statement to Apply to Substantial Assistance Cases Involving Statutory Minimums.

The heart of the respondent's argument that the Commission did not implement the mandate of § 994(n) to address its substantial assistance rules to statutory

minimum cases is the Commission's use of the phrase "the court may depart from the guidelines" in § 5K1.1. The government insists that the absence of the additional term, *and from a statutory minimum*, is fatal to the petitioner's case. The government's reading of the body of § 5K1.1, however, lacks an appreciation of how the Commission uses guideline and policy statement text versus guideline commentary in the Sentencing Guidelines Manual and how the Commission uses the term "the guidelines" to have different meanings depending on the context in which it is used.

### 1. Under the Commission's Practice and Procedure, It Was a Reasonable Choice Not to Discuss Statutory Minimums in the Body of § 5K1.1, But Instead to Explain The Relationship in Explanatory Commentary.

There are several reasonable and consistent explanations for why the Commission used the phrase, "depart from the guidelines," in § 5K1.1, yet still intended this policy statement to apply to substantial assistance cases in which the court wishes to exercise its discretion to impose a sentence below a statutory minimum.

First, as discussed in the preceding section, in the interest of uniformity and pursuant to its Congressional mandate, the Commission chose to require a government motion for guideline departures, although such a requirement was not necessarily imposed by § 994(n). Obviously, this policy decision had to be reflected in the body of § 5K1.1. On the other hand, because a government motion was already required for statutory minimum cases by § 3553(e), it would have been surplusage for the Commission to add the phrase the government contends is missing to the body of § 5K1.1. As noted by Amicus NACDL,



the absence of that phrase should, therefore, be accorded no significance. NACDL Br. at 21-22.[7]

Second, as noted in petitioner's initial brief, the Commission uses the body of each guideline or policy statement to describe the correct approach to the "heartland case." U.S.S.G. Ch. 1, Part A(4)(b) (p.s.). Given that the majority of federal criminal statutes do not contain statutory minimums, it was reasonable for the Commission to discuss such cases only in commentary. *See* U.S.S.G. § 1B1.7 (p.s.) The government does not respond to either of these two "drafting" arguments.

Third, and most simply, the phrases "depart from the guidelines" itself covers and encompasses the power to sentence below a mandatory minimum. In cases where a statutory minimum term applies which is lower than the applicable guideline range, as in petitioner's case, a sentence below the mandatory *is* a departure from the guideline as well. Where the mandatory term is higher than what would otherwise be the guideline range, the guidelines themselves define that statutory requirement as "the guideline sentence" U.S.S.G. § 5G1.1, so that a "departure from the guidelines" is, in that sort of case, also a sentence below the mandatory minimum. Thus, the terminology of § 5K1.1 merely represents an economy of language.

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[7] Amicus NACDL also correctly points out that under U.S.S.G. § 1B1.7, policy statements (such as § 5K1.1) and commentary (such as the application notes to § 5K1.1), are accorded equal weight. Thus, the Commission did not intend that the body of § 5K1.1 be examined independently of the relevant commentary, NACDL Br. at 21.

### 2. Use of the Term "the Guideline" is Sufficiently Variable to Mean a Sentence Otherwise Required by a Statutory Minimum in § 5K1.1.

The respondent's argument that the text of § 5K1.1 fails to address statutory minimums is premised on a rigid definition of the term, "the guidelines" as used in § 5K1.1, and one which is mutually exclusive of statutory minimums. Contrary to these assumptions, however, the Commission itself uses the term, "the guidelines," to have a variety of meanings, including reference to statutory minimums under certain circumstances. Thus the term, "the guideline sentence," in § 5G1.1, is used by the Commission to mean both a guideline derived and a statutory minimum derived term of imprisonment.[8] This broader definition of "the guidelines" in § 5K1.1 has the advantage of being consistent with the congressional mandate in § 994(n) to include sentences below a statutory minimum, and hence should be preferred.

This interpretation of the term, "the guidelines," in § 5K1.1 is also supported by the Commission's choice of language in the rest of "Part K – Departures" in the Guidelines Manual. In these related policy statements (*see* §§ 5K2.0-2.16, which describe other grounds for departures), the Commission consistently uses the narrower term, "the authorized guideline range." This difference also supports the inference that the Commission had a broader definition in mind for the term "the guidelines" as used in § 5K1.1.

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[8] *See also* NACDL Brief at 22-23 (discussing Congress' uses of multiple meanings of the phrase, "the guidelines").



### C. The Applicable Commentary Reveals the Commission's Intent that § 5K1.1 Apply to Statutory Minimum Cases.

Petitioner has argued that Application Note 1 to § 5K1.1 provides evidence that the Commission intended § 5K1.1 to apply to substantial assistance cases involving statutory minimums. Pet. Br. 23-31. Respondent disputes the significance of this note, again, basing its argument on the unwarranted inferences that the first clause of § 3553(e) tells the entire tale. However, Application Note 1 is more naturally read as appraising a sentencing court that it has authority under § 5K1.1 and § 3553(e) to impose a sentence that is below the guideline range, even if that sentence is also lower than a statutory minimum.

Petitioner's interpretation of § 5K1.1, but not the respondent's, also gives meaning to Application Note 3 to § 5K1.1. See Pet. Br. 27-28. The respondent dismisses Application Note 3 and this inference, arguing only that it does not directly address the question presented in this case. Resp. Br. 24 n. 6. Similarly, the respondent refuses to address the import of Application Note 7 to § 2D1.1. Resp. Br. 24 n. 6. Application Note 7 refers only to § 994(n) and § 5K1.1 as the authority for the court's power to sentence below a statutory minimum. The Commission's failure to cite § 3553(e) suggests that the Commission understood § 994(n) and § 5K1.1 to encompass the authority of the court to impose a sentence lower than a statutory minimum.[9]

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[9] The respondent claims that the Commission met the mandate of Section 994(n) because the factors listed in § 5K1.1 apply after the government specifically requests a sentence below a statutory minimum. Resp. Br. at 23. This contradicts respondent's earlier claim that § 5K1.1 does not apply to statutory minimums because the Commission did not refer to them in the body of § 5K1.1. This argument is also inconsistent

### D. The Government's Interpretation of § 5K1.1 Would Lead to Absurd Results.

All of the government's arguments are premised on a sentencing scenario where the guideline range is higher than the statutory minimum. The opposite situation also occurs frequently,[10] and under those circumstances, the government's interpretation of § 5K1.1 leads to absurd results.

Assume that during plea negotiations, the government promises to file a substantial assistance motion under § 5K1.1. After the presentence investigation, however, the guideline range is determined to be lower than the statutory minimum. Under the government's approach, the government's promise to move under § 5K1.1 is now completely worthless to the defendant either because the statutory minimum is above the guideline range, or because the "guideline sentence" is also a mandatory minimum. U.S.S.G. § 5G1.1(b), from which no departure, on the government's theory, has been authorized. Recognizing this anomaly, the Third Circuit suggests in the opinion below that a motion under either § 5K1.1 or § 3553(e) motion would be sufficient in this instance. J.A. 30 (*United States v. Melendez*, 55 F.3d 130, 135 (3d Cir. 1995)). But, either § 5K1.1 is a conduit for the court's authority under § 3553(e), or it is not. Hence, this concession by the court below reveals the inconsistency

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with the mandate of § 994(n). Section 994(n) requires that the Commission regulate all statutory minimum substantial assistance cases, not just those in which the government consents to regulation.

[10] *See, e.g., Neal v. United States*, 516 U.S. ___, 116 S.Ct. 763, 765 (1996) (defendant's guideline range was seventy to eighty-seven months but was sentenced to the applicable ten year mandatory minimum because that was his "guideline sentence" under U.S.S.G. § 5K1.1).



of its opinion and is fatal to the respondent's position as a general solution to the problem presented.

## III. The Government's General Policy Arguments Are Not Persuasive Evidence that Congress Intended to Give the Government Control Over a Court's Statutory Sentencing Discretion in Substantial Assistance Cases.

Throughout its brief, the respondent argues that it is good criminal justice policy to have a bifurcated substantial assistance scheme in which the prosecutor controls the court's sentencing discretion. The government's self aggrandizing judgment of what constitutes good policy is no substitute for evidence that Congress shared this view. Furthermore, there are sound policy reasons which suggest that Congress had no such purpose in mind when it enacted the three substantial assistance provisions in the 1996 ADAA.

### A. The Government Has Provided No Evidence of Congressional Intent to Support Its Policy Arguments.

The respondent contends that Congress implicitly created a bifurcated, two-track motion system in the ADAA under which the prosecutor can control the court's discretion to impose a sentence below a statutory minimum or below a guideline range. The respondent's argument overlooks the fact that Congress had the clear opportunity to establish a bifurcated system in the ADAA when it amended Rule 35(b) to create a post-conviction substantial assistance mechanism.[11] Instead, Congress

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[11] A bifurcated Rule 35(b) would explicitly require separate government motions, or a limitation on the court's power tied to the extent of relief sought by the government as movant, for a

chose to create one rule of criminal procedure under which the court could impose a sentence below the previous statutory or guideline minimum.

To support its policy argument, the government attempts to analogize the power it seeks here over the court's sentencing discretion to other traditional prosecutorial functions, Resp. Br. at 13, 25-26, citing, *inter alia*, *Wade v. United States*, 504 U.S. 181 (1992). However, the government's reliance in *Wade* is misplaced for two reasons. First, in *Wade*, the Court explicitly decided not to address the issue presented in this case *Id.* 504 U.S. at 185 ("We are not, therefore, called upon to decide whether § 5K1.1 'implements' and thereby supersedes § 3553(e) . . . or whether the two provisions pose two separate obstacles."). Second, try as the government might to appropriate that power, the decision to pass sentence is still presumed to lie within the domain of the court and is thus readily distinguishable from other traditional prosecutorial decisions. In fact, recognizing this distinction, in § 5K1.1, once the government files its motion, the Commission gave the government only an advisory role with the court determining the appropriate sentence. Therefore, there is no evidence that the Congress or the Commission intended to further encroach on the traditional authority of the court over sentencing.

### B. The Power Sought By the Government Is Both Unnecessary, and an Unlikely Choice of Either Congress or the Commission to Increase the Government's Plea Bargaining Position.

In the final analysis, much of the respondent's position in this case boils down to a policy argument that the government needs or deserves more bargaining power in

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substantial assistance reduction from the guideline range and from a statutory minimum.



substantial assistance cases that Congress chose to grant it. This argument flies in the face of the tremendous leverage that was granted to the government in the ADAA's substantial assistance scheme, no matter how § 994(n) and § 5K1.1 are construed in this case.

The 1986 ADAA created both mandatory minimums and the power to waive them to reward substantial assistance. Section 3553(e) explicitly grants the government a powerful tool in plea bargaining negotiation by requiring a government motion. The Commission further expanded this power by engrafting the government motion to substantial assistance case under the guidelines. Therefore, the government's undocumented assertion that it has still greater needs rings hollow and should be unpersuasive to the court.[12]

Second, if Congress and the Commission sought to give the prosecutor more control over the amount of the sentence reduction in substantial assistance cases, there is no reason to believe either would have chosen such an unwieldy method as desired by the government in this case. For example, while in many cases the guideline range is higher than the applicable statutory minimum, there is no uniform ratio for how much higher the guidelines are in any given case. Quite simply, the bargaining chip the government seeks here is an imprecise tool for fine tuning a plea agreement.[13] Ultimately, the

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[12] The respondent suggests that under petitioner's interpretation of these provisions, the government will become less willing to make substantial assistance motions, to the ultimate detriment of defendants. However, decisions contrary to the lower court opinion in this case have been the law in several circuits since 1992. Nevertheless, the government provides no evidence of any decrease in cooperation agreements or any detrimental impact on law enforcement.

[13] Of course, nothing in this argument prevents the government from bargaining for a specific limit to the

government's policy arguments are devoid of statutory support and unwise on their merits. *See also* Morvillo, Robert G. & Bohrer, Barry A., "Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation," 32 Am. Crim. L. Rev. 137, 151 (1995); Powell, William J. & Cimini, Michael T., "Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?" 97 W.Va.L.Rev. 373 (1995).

## CONCLUSION

For all the foregoing reasons, and those set forth in the petitioner's opening Brief, the judgment of the United States Court of Appeals for the Third Circuit must be reversed, and the case remanded for resentencing, without limitation as to the extent of the downward departure that can be granted.

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Respectfully submitted,

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departure, including restricting the sentence to a range above a statutory minimum pursuant to Fed. R. Crim. P. 11(e)(1)(A-C).